Supreme Court, U.S.
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No. 00-

In the Supreme Court of the United States

JODI MICHAELLE CARLSON,
Plaintiff-Petitioner,

vs.

HYUNDAI MOTOR CO., et al.,
Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Eighth Circuit Court of Appeals erred in not remanding to the district court for specific findings on exceptional circumstances under Fed.R.Civ.P. 60(b)(6)?

Whether the Eighth Circuit Court of Appeals erred in determining that the case was not pending at the time of the statutory amendment to Minn.Stat. § 169.685, subdivision 4?

Whether Minn.Stat. § 169.685, subdivision 4 and similar "seat belt gag rule" legislation violate an injured person's Federal Due Process and Equal Protection rights under Amendment XIV to the United States Constitution given the injured's total inability to bring a claim against the negligent party?

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Jodi Michaelle Carlson respectfully petitions for a Writ of Certiorari to review the determination of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 222 F.3d 1044 (8th Cir. 2000).[1] Rehearing and rehearing *en banc* were denied by order dated September 19, 2000, with a mandate issuing September 26, 2000.[2] Judgment was entered at the district court level on September 29, 2000. The initial opinion of the district court is unreported.[3]

JURISDICTION

Federal Jurisdiction was obtained through diversity upon the request for removal by the Respondent from State Court. On appeal from a denial of vacatur under Fed.R.Civ.P. 60(b)(6) by the district court judge, the Eighth Circuit Court of Appeals' initial Decision was filed August 15, 2000.[4] Following this August 2000 decision, the Petitioner sought rehearing and rehearing *en banc*. Both requests were denied by order dated September 19, 2000 with a mandate issuing on September 26, 2000.[5] Judgment was entered at the district court level on September 29, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

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[1] *See* Appendix at A-42.

[2] *See* Appendix at A-45.

[3] *See* Appendix at A-40 .

[4] *See* Appendix at A-42.

[5] *See* Appendix at A-45.

STATUTORY PROVISIONS INVOLVED

Article XIV, Section 1 to the United States Constitution:

> All persons born or naturalized in the Untied States, and subject to the jurisdiction thereof, are citizens of the of the United States and or the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code Annotated, Federal Rules of Civil Procedure for the United States District Courts, VII. Judgment, subdivision (b) (Federal Rule of Civil Procedure 60(b)):

> Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's representative from a final judgment, order, or proceeding for the following reasons:
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
> (4) the judgment in void;
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated or it is no longer

equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment.

* * * * * * * * *

Minnesota Statute Section 169.685, section 1, subdivision 4 (1963) in relevant part:

> Proof of the use or failure to use seat belts . . . or proof of the installation or failure of installation of seat belts . . . shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle.

Minnesota Statute Section 169.685, section 1, subdivision 4 (1999):

> Section 1. Minnesota Statutes 1998, section 169.685, subdivision 4, is amended to read:
>
> (a) Except as provided in paragraph (b), proof of the use or failure to use seat belts or a child passenger restraint system as described in subdivision 5, or proof of the installation or failure of installation of seat belts or a child passenger restraint system as described in subdivision 5 shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle.
>
> (b) Paragraph (a) does not affect the right of a person to bring an action for damages arising out of an incident that involves a defectively

designed, manufactured, installed, or operating seat belt or child passenger restrain system. Paragraph (a) does not prohibit the introduction of evidence pertaining to the use of a seat belt or child passenger restraint system in an action describe in this paragraph.

Section 2. Section 1 is effective the day following final enactment and applies to actions pending on or commenced on or after the effective date.

STATEMENT OF THE CASE

The Petitioner, Jodi Carlson, was a teenager when, on April 10, 1995, she was involved in a rollover accident while riding as a passenger in a Hyundai Excel. Although she wore her seat belt at the time, Jodi was ejected from the vehicle as it rolled. Jodi's injuries resulted in her current C5-C6 quadriplegia.

Suit was filed on behalf of Jodi Carlson against the Respondent Hyundai in state court. Hyundai removed to federal court based on diversity of citizenship. Thereafter, Hyundai sought dismissal of the Petitioner's claims based on a Minnesota law in effect at the time, i.e., Minnesota Statute Section 169.685, subdivision 4 (1963). The statute relied upon by the Respondent had been interpreted to not allow claims based on defective passenger restraint systems.[6] Based on this statute, District Court Judge Richard H. Kyle,

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[6] *See* Minn.Stat. § 169.685, subdivision 4 (1963); Anker v. Little, 541 N.W.2d 333 (Minn.Ct.App. 1995) *rev. denied* (Minn., February 9, 1996); Schlotz v. Hyundai Motor Co., 557 N.W.2d 613 (Minn.Ct.App. 1997) *rev. denied* (Minn., March 26, 1997) *cert. denied*, 118 S.C. 80 (1997); Olson v. Ford Motor Company, 558 N.W.2d 491 (Minn. 1997); Marsden v. Crawford, 589 N.W.2d 804 (Minn.Ct.App. 1999), *rev. denied* (Minn., May 18, 1999).

dismissed the Petitioner's cause of action.[7] The Eighth Circuit Court of Appeals affirmed the lower court.[8] Following denial of rehearing and rehearing *en banc*, a mandate was issued on March 15, 1999 and on March 19, 1999, judgment was entered at the district court level.[9]

Effective May 18, 1999, the Minnesota Legislature, over the veto of Governor Ventura, amended the statute which had originally effectively eliminated Ms. Carlson's claims. This amendment came within the time period of application for writ of certiorari to this Court.

Following the amendment, Petitioner filed a motion to vacate under Fed.R.Civ.P. 60(b)(6) with the district court. On June 28, 1999, United States District Court Judge Richard H. Kyle denied this motion.[10] The Petitioner appealed to the Eighth Circuit Court of Appeals. The Eighth Circuit affirmed on August 15, 2000 with a denial of rehearing and rehearing *en banc* on September 19, 2000.[11] The Petitioner now seeks review by this Court.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit Court of Appeals erred by not remanding based on the failure of the district court to address the exceptional circumstances brought before it in flatly denying the Petitioner's motion for vacatur under Federal Rule of Civil Procedure 60(b)(6). This failure sets up a dangerous trend, is against the judicial policy requiring determination of issues brought by litigants, and is in

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[7] *See* Appendix at A-1.

[8] *See* Appendix at A-8.

[9] *See* Appendix at A-17 and A-19.

[10] *See* Appendix at A-40.

[11] *See* Appendix at A-42 and A-45.

contravention of the determinations of other circuits thus requiring the attention of this Court.

Furthermore, the Eighth Circuit Court of Appeals failed to remedy an extreme and important injustice perpetuated by the district court and in doing so has so far departed from the usual and accepted course of judicial proceedings as to call for this Court's supervisory power. More specifically, the Eighth Circuit Court of Appeals ignored the Federal Constitutional guarantees of the 14th Amendment to the United States Constitution in denying the Petitioner access to the courts to pursue her claims against the Respondent Hyundai in opposition to her rights to due process and equal protection.[12] The result reached is unduly harsh in its impact and should be rectified by this Court.[13]

I. The Eighth Circuit Court of Appeals erred in not remanding to the district court and requiring it to address exceptional circumstances under Fed.R.Civ.P. 60(b)(6).

Review is required in this case given the mixed signals which have resulted from the Eighth Circuit Court of Appeal's August 15, 2000 decision which does not affirm the requirement under Federal Rule of Civil Procedure 60 that a district court exercise discretion in reaching any determination under the Rule.[14]

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[12] Review of State law as applied to State citizens is properly reviewed by the Supreme Court of the United States in terms of its constitutionality. *See e.g.*, New York v. Ferber, 458 U.S. 747 (1982); New York v. O'Neill, 359 U.S. 1 (1959); Santosky v. Kramer, 455 U.S. 745 (1982).

[13] *See e.g.*, Montana v. Kennedy, 366 U.S. 308, 309 (1961); Southern Construction Co. v. Pickard, 371 U.S. 57, 60 (1962).

[14] *C.f.* Wojton v. Marks, 344 F.2d 222 (7th Cir. 1965) (district court has wide discretion); Delzona Corp. v. Sacks, 265 F.2d 157 (3rd Cir. 1959); Perrin v. Aluminum Co. of America, 197 F.2d 254 (9th Cir. 1952);

A. The district court did not exercise discretion, but rather addressed the Rule 60(b) motion purely as a matter of law.

The District Court did not address the exceptional circumstances presented by this case and therefore abused its discretion in not meeting the expectations of a determination under Rule 60(b).[15] The district court was presented with its earlier judgment which was entered against the Petitioner based on a Minnesota statute which was amended to allow her claim within months of the Eighth Circuit Court of Appeal's determination that her claim was barred. The Petitioner presented the recent amendment, in addition to her efforts in creating this amendment and her catastrophic damages, as exceptional circumstance which in the district court's discretion could allow for the vacatur of the earlier judgment and allow for the reinstatement of Petitioner's claims on her initiative. In addition, it was argued that, not vacating the judgment may result in Ms. Carlson's claims never being

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Lee v. River Forest, 936 F.2d 976 (7th Cir. 1991) (broad discretion to grant relief).

[15] Spann v. Commissioners of the District of Columbia, 443 F.2d 715 (D.C. 1971) (although relief under Rule 60(b) is discretionary, the liberal spirit of the rule, together with the basic policy of favoring the resolution of litigation on the merits requires a close review of the exercise of that discretion in cases where denial of the motion has precluded consideration of the merits of the controversy). *See e.g.*, Adams v. Merrill Lynch Pierce Fenner & Smith, 888 F.2d 696 (10th Cir. 1989) (the determination of the district court will be overturned when there is an abuse of discretion); Seven Elves, Inc. v. Eskenazi, 635 F.2d 396 (5th Cir. 1981) (denial was abuse of discretion); Clark v. Burkle, 570 F.2d 824 (8th Cir. 1978) (judge's failure to vacate was an abuse of discretion); Assman v. Fleming, 159 F.2d 332, 336 (8th Cir. 1947) (when moved, discretion must be exercised reasonably and according to accepted principles).

heard and an extreme injustice will occur.[16] These circumstances were not addressed by the district court.

B. Rule 60(b) confers broad discretion on the district court whose determinations are not to be based solely on perceived law.

Fed.R.Civ.P. 60(b) provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party. . . from a final judgment, order, or proceeding for the following reasons . . . . (6) any other reason justifying relief from the operation of the judgment.

Subpart 6 "confers broad discretion on the trial court to grant relief when 'appropriate to accomplish justice'"[17] and constitutes a "grand reservoir of equitable power to do justice in a particular case."[18] The rule is utilized under

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[16] *See* Seven Elves, Inc. v. Eskenazi, 635 F.2d 396 (5th Cir. 1981) (absence of fair opportunity to present evidence); Tribble v. Bruin, 279 F.2d 424 (4th Cir. 1960) (upholding vacatur of judgment and granting new trial for inadequacy of verdict); United States v. Cirami, 563 F.2d 26 (3rd Cir. 1977)(where counsel failed to oppose motion for summary judgment due to mental disorder, relief under 60(b)(6) appropriate); Vecchione v. Wohlgemuth, 426 F.Supp. 1297 (E.D. Pa. 1977) (motions should be granted to serve interest of justice).

[17] International Controls Corp. v. Vesco, 556 F.2d 665, 668, n. 2 (2nd Cir. 1977) *quoting* Klapprott v. United States, 335 U.S. 601, 615 (plurality opinion of Black, J.), *modified on other grounds*, 336 U.S. 942 (1949) *cert. denied*, 434 U.S. 1014 (1978). *See also* Malta Irrigation Dist. v. F.E.R.C., 955 F.2d 59, 65 (D.C.Cir. 1992); Williams v. St. Louis County, 812 F.2d 1079, 1083 (8th Cir. 1987); Allstate Insurance Co. v. Michigan Carpenters' Council Health & Welfare Fund, 760 F.Supp. 665, 668 (D.C. Mich. 1971).

[18] Radack v. Norwegian America Line Agency, Inc., 318 F.2d 538, 542 (2nd Cir. 1963).

extraordinary circumstances[19] or where the judgment may work an extreme and undue hardship[20] and "should be liberally construed when substantial justice will thus be served."[21]

By the very nature of the Rule, a district court is required to exercise its discretion under Federal Rule of Civil Procedure 60(b) to determine whether a non-pending case's judgment should be vacated.[22] In this case, the District Court did not exercise its discretion in reaching a decision regarding whether to vacate the subject judgment.

On appeal, the Eighth Circuit Court of Appeals did not make note of this failure in applying discretion, but rather found that the district court had not abused its discretion. This determination is contrary to the facts of this case in that the Opinion of the District Court does not exhibit any indication of discretion as required under the Rule. Rather, the Court of Appeals took it upon itself to provide the discretionary rationale. Given the procedural posture of this case, it was not the place of the Court of Appeals to exercise discretion for the District Court. Rather, this matter should have been remanded for the use of the District Court's discretion.[23] By not mandating the use of discretion when

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[19] Ackermann v. United States, 340 U.S. 193, 1999 (1950).

[20] *See* United States v. Karahalias, 205 F.2d 331, 333 (2nd Cir. 1953).

[21] Radack v. Norwegian American Line Agency, Inc., 318 F.2d 538, 542 (2nd Cir. 1963); *see also* Dunlop v. Pan American World Airways, Inc., 672 F.2d 1044, 1051 (2nd Cir. 1982).

[22] *See* American Employers Ins. Co. v. Sybil Realty, Ins., 270 F.Supp. 566 (La. 1967) (while the question of the power of the court to grant the motion was one of law, the grant or denial of the motion was addressed to the sound discretion of the court guided by accepted principles applied in light of all the circumstances).

[23] *See* Robb v. Norfolk W. Ry. Co., 122 F.3d 354, 357-62 (7th Cir. 1997) (court vacated and remanded denial of Rule 60(b) motion where district court apparently believed it had no discretion in granting motion).

reaching a decision under Rule 60, the Court of Appeals perpetuated the confusion surrounding the Rule and did not reaffirm the district court's inherent power to vacate even final judgments in its discretion and without strict regard to legal strictures. This determination requires additional review by this Court.

i. Petitioner is not without a legal basis/precedent for her request in that a change in statutory law has been found to be a justifiable basis for vacating a judgment.

The Petitioner brought her motion to vacate under this Rule as a result of recent changes in statutory law. Changes in statutory law have been found to be a justifiable basis for vacating a judgment.[24] Regardless of when made, the

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[24] *See* Cornell v. Nix, 119 F.3d 1329 (8th Cir. 1997) (post-judgment change in law may constitute extra-ordinary circumstances); In re Pacific Far East Lines, Inc., 889 F.2d 242 (9th Cir. 1989) (enactment of statute retroactively applicable to fees pain in bankruptcy case qualified as a reason justifying relief from order that fees be paid); McGrath v. Potash, 199 F.2d 166 (D.C. Cir. 1952) (when Congress removed requirement from Act, government entitled to have previously issued injunction lifted); Allen v. Shalala, 835 F.Supp. 462 (D.C. Ill. 1993) (claimant entitled to relief from earlier judgment when change in law effected his entitlement to benefits); Manhattan Cable Television, Inc. v. Cable Doctor, Inc., 824 F.Supp. 34 (D.C.N.Y. 1993) (relief from prior judgment when prior to end of decisional process, Congress enacted new legislation amending Act and which made defendant's conduct violative of the Act); McGrath v. Potash, 199 F.2d 166 (D.C.Cir. 1952) (Rule 60(b)(6) relief granted following passage of new act by Congress eliminating the statutory requirement on which judgment was based). *See also* Adams v. Merril Lynch Pierce Fenner & Smith, 888 F.2d 696 (10th Cir. 1989) (change in relevant case law warrants relief from judgment); Pierce v. Cook & Co., Inc., 518 F.2d 720 (10th Cir. 1975), *cert. denied*, 423 U.S. 1079.

decision to reinstate a cause of action is within the discretion of the Court.[25]

A change in statutory law differs significantly from a change in decisional law in terms of providing a basis for vacating a judgment.[26] The Ninth Circuit explained that changes in statutory law differ from decisional law in that under decisional law the party at issue seeks "a second bite at the apple" when some other party, in some other case, appeals and the decisional law changes.[27] The above-captioned case does not fall within that scenario. The Petitioner has sought and planned to appeal from all relevant decisions and it was through her own efforts that the statutory change took place which now allows claims such as hers to proceed.[28]

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[25] Materese v. LeFevre, 801 F.2d 98, 107 (2nd Cir. 1986), *cert. denied* 480 U.S. 908; Max M. v. Thompson, 585 F.Supp. 317 D.C.Ill. 1984) *amended* 592 F.Supp. 145 (D.C. Ill. 1984); Lairsey v. Advances Abrasives Co., 542 F.2d 928 (5th Cir. 1976) (neither decisions nor rule 60 inflexibly require that motion pursuant rule 60 raising post-judgment change in law be filed before time for appeal has run). *See also* Booker v. Singletary, 90 F.3d 440 (11th Cir. 1996) (in addition citing a change in law, party seeking relief from final judgment must persuade of extraordinary circumstances and even then within the court's sound discretion).

[26] *See e.g.*, In re Pacific Far East Lines, Inc., 889 F.2d 242, 250 (9th Cir. 1989); Yaris v. Special School District of St. Louis County, 661 F.Supp. 996, 999 (E.D. Missouri 1987).

[27] 889 F.2d at 250.

[28] Jodi Carlson was still a teenager when she was seriously injured in a rollover while riding as a passenger in a car manufactured by the Respondent. As a result of her injuries she was partially paralyzed and incurred substantial medical bills. She has overcome tremendous odds in her recovery but remains paralyzed. When confronted with the seat belt gag rule which did not allow her to bring a product liability/crashworthiness case against the Respondents, she went to the Minnesota Legislature to assist in compelling the enactment of an amendment to Minn.Stat. § 169.685. Ms. Carlson's efforts ultimately ushered in an override of the Governor's veto (a feat which had not accomplished in seventeen years) and the amendment became law on May

With regard to changes in statutory law, the United States Supreme Court has found:

> "[W]e need not go so far here as to decide that when an appeal has been abandoned or not taken because of a clearly applicable adverse rule of law, relief under Rule 60 (b) is inflexibly to be withheld when there has later been a clear and authoritative change in governing law."[29]

Likewise, the United States Supreme Court has spoken regarding the *res judicata* effect of a prior decision:

> [t]he fact that this court had held the original Pima county bonds invalid does not affect the question. They were invalid because there was no power to issue them. They were made valid by such power being subsequently given, and it makes no possible difference that they had been declared to be void under the power originally given them. The judgment in that case was res judicata only of the issues then presented, of the facts as they then appeared, and of the legislation then existing.[30]

Here, the Petitioner based her renewed claim, in part, on a statutory change which as applied to the facts of her case allows a cause of action.[31]

17, 1999. Ms. Carlson now respectfully requests that her efforts not be for naught.

[29] Polites v. United States, 364 U.S. 426, 433 (1960).

[30] Utter v. Franklin, 172 U.S. 416, 424 (1899).

[31] *See* Knox v. Lichtenstein, 654 F.2d 19 (8th Cir. 1981); Michigan Surety Co. v. Service Mach. Corp., 277 F.2d 531 (relief may be granted where a judgment has become erroneous even though it may have been proper when entered). *See also* Cincinnati Ins. Co. v. Ryers, 151 F.3d 574

ii. The Petitioner also addressed the equities in requesting vacatur under Rule 60(b).

In addition, the Petitioner appealed to the equities as a basis for vacating the judgment. In this case equities mandate that the Judgment be vacated and that the Petitioner be allowed to present her claims to a jury. Petitioner is merely asking that the earlier Judgment be set aside so that for the first time she might prosecute her claims on their merits - she is entitled to a fair trial which she has not had and the language of Rule 60 is broad enough to allow for it.[32]

Jodi Carlson was still a teenager when she was seriously injured in a rollover while riding as a passenger in a car manufactured by the Defendant. As a result of her injuries she was partially paralyzed and incurred substantial medical bills. She has overcome tremendous odds in her recovery but remains paralyzed. When confronted with the seat belt gag rule which was found not to allow her to bring a product liability/crashworthiness case against the Respondent, she went to the Minnesota Legislature to assist in compelling the enactment of an amendment to Minn.Stat. § 169.685. Ms. Carlson's efforts ultimately ushered in an override of the Governor's veto (a feat which had not accomplished in seventeen years) and the amendment became law on May 17, 1999. Ms. Carlson now respectfully requests that her efforts not be for naught but rather that the earlier Judgment be vacated and she then be allowed to reinstate her claim.

(6th Cir. 1998) (claimant entitled to relief from summary judgment entered against him when significant change in evidentiary law and unless relief granted claimant would lose right to assert similar theory); Smith v. Holtz, 879 F.Supp. 435 (D.C. Pa. 1995).

[32] *See* Marcel v. City of Medford, 924 F.Supp. 320 (D.C. Mass. 1996) (ability of plaintiffs to file new complaint after dismissal without prejudice precluded finding of extraordinary circumstances necessary for relief under Rule 60(b)(6).

The Petitioner brought her motion within a reasonable time following the enactment of the amended statute and the Respondent has not been prejudiced by this delay especially in light of the fact that the Respondent's counsel also has been involved in the amendment debate.[33]

The Petitioner will suffer extreme and undue hardship if her claim is not renewed. She has suffered a severe and permanent spinal cord injury which has rendered her partially paralyzed as a result of the defective nature of the seat belt used by the Respondent in its vehicle. Without recourse to the judicial system, a substantial injustice will occur in that Jodi Carlson will be unable to pursue financial remedies for the damages she suffered. This hardship is undue to Ms. Carlson who fought so hard before the Minnesota Legislature to change the law which at one time was interpreted to preclude claims such as hers.

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[33] George Soule, a partner with the law firm representing Hyundai in the present action and which has represented auto manufacturers in the past with regard to seat belt claims, was working to keep the seat belt law from changing. Mr. Soule has been appointed by Governor Ventura as his legal advisor for such things as the appointment of state court judges and accordingly had access to the Governor regarding the proposed statutory amendment. To the best of the Petitioner's knowledge, Mr. Soule was the only advisor advising Governor Ventura that the proposed amendment be vetoed. It cannot be denied that Mr. Soule also had a interest in the outcome of the amended statute - a financial interest. The Governor's veto of the proposed amendment was, then, in no small part, a result of the advice given by George Soule. This veto prolonged the end result of passage of the amended seat belt law. It is therefore through the actions of the Respondent's counsel that the amendment was forced to take effect on the last day of the Legislative session. The Respondent therefore cannot claim unfair surprise or prejudice by the amendment which directly affects the claims of Jodi Carlson against it. But rather has been fully advised of the Legislative changes.

II. In the alternative, the Lower Courts erred in determining the case was not pending at the time of the subject amendment.

The Petitioner does not maintain that the pendency of her claim is determinative of the issues presently before the Court. Rather, it is submitted that the pendency of the claim is an alternative basis which allows for reinstatement under the language of Minn.Stat. § 169.685, subdivision 4 as amended.

On or about May 17, 1999, the Minnesota Legislature overturned Governor Jesse Ventura's veto of the amended Minn.Stat. § 169.685. The veto effectively codifies the following as Minn.Stat. § 169.685, subdivision 4:

> Section 1. Minnesota Statutes 1998, section 169.685, subdivision 4, is amended to read:
>
> (a) Except as provided in paragraph (b), proof of the use or failure to use seat belts or a child passenger restraint system as described in subdivision 5, or proof of the installation or failure of installation of seat belts or a child passenger restraint system as described in subdivision 5 shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle.
>
> (b) Paragraph (a) does not affect the right of a person to bring an action for damages arising out of an incident that involves a defectively designed, manufactured, installed, or operating seat belt or child passenger restrain system. Paragraph (a) does not prohibit the introduction of evidence pertaining to the use of a seat belt or child passenger restraint system in an action describe in this paragraph.

> Section 2. Section 1 is effective the day following final enactment and applies to actions pending on or commenced on or after the effective date.

With regard to changes in state law during the pendency of an action, the Court's duty to mirror state law does not end with the entry of judgment, but rather the Appellate Court must apply state law and give effect to any change in state law occurring subsequent to the Court's decision under review by the Court of Appeals or the United States Supreme Court.[34] Wright & Miller explain:

> If during the pendency of an action in federal court state law changes or a previously open or ambiguous question of state law is resolved or clarified, the federal court must take this into account and reverse or revise its earlier determination of state law accordingly.[35]

In light of the recent statutory change to Minn.Stat. § 169.685, subdivision 4 which reinstates a cause of action for defective seat belts which cause personal injuries and the pending status of her claims against the Respondent, the Petitioner's Complaint should be reinstated and her claims be allowed to proceed.

This statutory change occurred during the time permitted for petitioning the Supreme Court of the United States and therefore the earlier entry of "judgment" does not constitute a final judgment *per se*. The United States Supreme Court

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[34] *See* Wright & Miller, Federal Practice and Procedure, Jurisdiction 2d § 4507 (1996) *citing* Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941). *See also* Blair v. Sealift, Inc., 91 F.3d 755 (5th Cir. 1996).

[35] Wright & Miller, Federal Practice and Procedure, Jurisdiction 2d § 4507, page 207 (1996) *citations omitted.*

definition of "final judgment" provides that a judgment becomes final as "the availability of appeal has been exhausted or has lapsed, and the time to petition for certiorari has passed."[36]

As an alternative to this Court's issuance of a writ and later determination of the issues presented, the Petitioner respectfully requests that this Court remand this case to the appropriate tribunal for reinstatement of the Plaintiff's cause of action.

III. The application of Minnesota Statute Section 169.685, subdivision 4 (1963) violates the federally protected constitutional rights of injured victims under the Equal Protection Clause and Due Process Clause of Amendment XIV to the U.S. Constitution by totalling barring legal recourse against the negligent party.

A. The Equal Protection Clause of Amendment XIV was violated by Minnesota Statute Section 169.685, subdivision 4.

Section 1 of the Fourteenth Amendment to the United States Constitution provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.[37] The guarantee is often referred as the Equal Protection Clause and it essentially requires that every state treat its citizens alike when similarly situated.[38]

"Equal protection" has been interpreted to mean that no person shall be denied the same protection of the laws which

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[36] Bradley v. Richmond School Board, 416 U.S. 696, 711, n. 14 (1974).

[37] U.S. Const., Amend. 14.

[38] Bowen v. Gilliard, 483 U.S. 587 (1987); City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

is enjoyed by other persons in like circumstances,[39] in their lives, liberty, and property, and in their pursuit of happiness.[40] In other words equal protection of the laws means that the rights of all persons must rest upon the same rule under the same circumstances.[41]

The Equal Protection Clause protects individuals against discrimination, whether occasioned by the express terms of a statute or by its improper execution. A distinction may not be drawn between individuals based on differences that are irrelevant to a legitimate governmental objective.[42]

The constitutional guarantee of equal protection was put in place to prevent the enactment and utilization of legislation

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[39] Kentucky Finance Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544 (1923), *on remand to* 181 Wis. 151, 196 N.W. 1023 (1923). *See also* Alexander v. Whitman, 114 F.3d 1392 (3rd Cir. 1997) *cert. denied*, 118 S.Ct. 367 (1997) (the guiding principle of "equal protection" is often stated as requiring that all persons be treated alike under like circumstances and conditions).

[40] State of Missouri ex rel Gaines v. Canada, 305 U.S. 337 (1938), *reh'g denied*, 305 U.S. 676 (1939), *and mandate conformed to*, 344 Mo. 1238, 131 S.W.2d 217 (1939).

[41] *See e.g.*, Miller v. Johnson, 515 U.S. 900 (1995), *on remand to*, 922 F.Supp. 1552 (S.D. Ga. 1995), *and on remand to*, 922 F.Supp. 1552 (S.D. Ga. 1995), *probable jurisdiction noted*, 116 S.Ct. 1823 (1996) *and judgment aff'd*, 117 S.C.t 1925 (1997) (like people must be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed); Vacco v. Quill, 521 U.S. 793 (1997) (the equal protection clause, rather than creating substantive rights, embodies the rule that the states must treat like cases alike).

[42] *See* Lehr v. Robertson, 463 U.S. 248 (1983); Rindaldi v. Yeager, 384 U.S. 305 (1966) (classifications may be made if they are reasonable and not arbitrary and are based upon material and substantial differences having a reasonable relation to the objects or persons dealt with and to the public purpose sought to be achieved); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973), *reh'g denied*, 411 U.S. 910 (1973), *and on remand to*, 54 Ill.2d 237, 296 N.E.2d 342 (1973), *cert. denied*, 414 U.S. 1039 (1973) (equal protection does not mean that a state may not draw lines that treat one class of individuals differently from others).

like that which confronted Jodi Carlson in her pursuit for the recovery of damages following the catastrophic collision in which she was involved.[43] The lower courts' interpretation of that statute violated the Equal Protection Clause of United States Constitution. This interpretation divided motor vehicle collision victims into two groups: people whose injuries are enhanced due to defective seat belts and people whose injuries are enhanced by non-seat belt vehicle components. The seat belt gag rule precluded the former group from introducing evidence of the devise -- a defective seat belt -- which caused their injuries, while failing to impose a similar bar on the latter group.

Petitioner in this litigation was deprived of the opportunity of proving a *prima facie* crashworthiness case and denied the opportunity to bring a common law cause of action, accordingly the interpretation of the seat belt gag rule was an unconstitutional denial of equal protection which, the Petitioner suggests, must be addressed by this Court.

B. The application of Minnesota Statute Section 169.685, subdivision 4 violates the federally protected constitutional rights of injured victims under the Due Process Clause of Amendment XIV to the U.S. Constitution by totalling barring legal recourse against the negligent party.

The Fourteenth Amendment to the U.S. Constitution guarantees to private individuals due process of law before the deprivation of life, liberty or property.[44] The guarantee of

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[43] *C.f.* Pembina Consol. Silver Mining & Milling Co. v. Com. of Pennsylvania, 125 U.S. 181 (1888).

[44] U.S. Const. amend 14.

due process bars states from enactments that "shock the sense of fair play."[45]

Due process guarantees to litigants the opportunity to present evidence and the right to argument.[46] A state legislature has the power to prescribe new, and alter existing rules of evidence, or to prescribe methods of proof, provided they do not violate constitutional requirements or deprive any person of his or her constitutional rights. In this case, the Petitioner's due process rights were violated in that the evidentiary rule proscribed by the Minnesota Legislature eliminated her right to present the evidence/facts bearing upon her cause of action against the Respondent. The subject law has been interpreted to altogether prohibit a party from exhibiting or establishing his or her rights. Ms. Carlson's due process rights have been substantially deprived by this law.[47]

The application of the seat belt gag rule has been used for much more than an evidentiary rule and goes much farther by abolishing a right of action. Not only was Petitioner not permitted to present evidence of seat belt use, but it was held that she could not present her cause of action. Due process of law under the 14th Amendment has been denied and Petitioner respectfully requests that this Court grant the present petition for a writ of certiorari so that this injustice may be confronted.[48]

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[45] *C.f.* Galvan v. Press, 347 U.S. 522 (1954) *reh'g denied*, 348 U.S. 852 (1954).

[46] Mathews v. Eldgridge, 424 U.S. 319 (1976).

[47] *See* 29 Am.Jur.2d, Evidence § 6.

[48] *C.f.* Thompson v. City of Louisville, 362 U.S. 199 (1960) (question does not rest on sufficiency of evidence but whether any evidence existed at all; Garner v. Louisiana, 368 U.S. 157 (1961) (convictions reversed because of lack of evidentiary support).

CONCLUSION

The Petitioner respectfully requests that this Court grant her Petition for a Writ of Certiorari so that this Court may more closely consider the abuse of discretion by the district court which was perpetuated by the Eighth Circuit Court of Appeals and has brought confusion to the role of the district court in utilizing its discretion under Federal Rule of Civil Procedure 60(b)(6). Petitioner also requests review of the constitutional challenges that she has made against the application of Minn.Stat. § 169.685, subdivision 4 that barred her cause of action below, or in the alternative, that this Court remand to the appropriate tribunal with an order that her case be reinstated given the recent amendment to Minn.Stat. § 169.685, subdivision 4 which no longer restricts evidence of defective restraint systems.

Dated: December 5, 2000

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
SIXTH DIVISION

Jodi Carlson,

Plaintiff,

v.

Civil No. 6-96-228/RHK/RLE
MEMORANDUM O PINION AND ORDER

Hyundai Motor Company, a South Korean corporation and Hyundai Motor American, Inc., a California corporation,

Defendants.

Harry A. Sieben and Carol L. O'Gara, Sieben, Gross, Von Holtum, McCoy & Carey, Minneapolis, Minnesota, for Plaintiff.

Robert M. Lewis and David W. Graves, Bowman & Brooke, Minneapolis, Minnesota, for Defendants.

Introduction

On April 10, 1995, Plaintiff Jodi Carlson ("Carlson") was injured in a car accident when she was ejected from the car while wearing her seat belt. She filed suit in Minnesota state court, Hubbard County, alleging claims against the car

manufacturer and distributor for strict liability and negligence based on the design of the passive seat belt system and door frame, and breach of the implied warranty of merchantability. The Defendants removed the case to this Court. This matter is before the Court on Defendants' Motion to Dismiss. For the reasons set forth below, the Court will grant the Motion.

Factual Background

On April 10, 1995, at approximately 2:50 a.m., Carlson was riding in a 1991 Hyundai Excel (hereinafter referred to as "the car") driven by Kyle Lindgren ("Lindgren"). (Am. Compl. ¶ IV.) Defendant Hyundai Motor Company designed, manufactured, marketed, and sold the car, and Defendant Hyundai Motor America, Inc. (collectively "Defendants") distributed it. (Id. ¶¶ IX, XIII.)

While driving outside of Akeley, Minnesota, Lindgren lost control of the car, and it rolled over, ending up on its top. (Am. Compl. ¶ IV.) Carlson was wearing a "securely fastened passive seat belt system,"[1] in which the shoulder harness portion of the passive seat belt system is attached to the door frame. (Id.) Carlson was ejected through the upper rear portion of the front passenger door, which bent out during the roll over, creating a significant gap and "eliminating any effective passenger restraint." (Id.)

As a result of the accident, Carlson sustained several fractures to her neck and spinal cord, rendering her a

[1] The "passive seat belt system" consisted of a "shoulder strap which was permanently attached at the base of the left side of the passenger's seat, extending across the torso and shoulder area of the passenger. It was manually fastened near the door on the upper [right] side of the [passenger]." (Am. Compl. ¶ VII.) The seat belt system included a lap belt restraint. (Id.)

quadrapeligic. (Am. Compl. ¶ V.) Carlson sustained these injuries as a "direct result of the failure of the structure of the car and the shoulder harness to keep her within the automobile." (Id.; see also id. ¶¶ XI, XV ("defective and unreasonably dangerous condition of the passive seat belt system and door frame were the direct cause of [Carlson's] injuries"), ¶ XVII ("the injuries sustained by ... Carlson which resulted from her use of the 1991 Hyundai Excel's passive seat belt system and door frame were directly caused by the negligence of defendant Hyundai Motor Corporation ...").)

Analysis

1. Standard of Review

A motion to dismiss should be granted "as a practical matter ... only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." Frey v. City of Herculaneum, 44 F.3d 667, 671 (8th Cir. 1995) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984)). Dismissal is "inappropriate unless it appears beyond a doubt that the [non-moving party] can prove no set of facts in support of his claim that would entitle him to relief." Hafley v. Lohman, 90 F.3d 264, 266 (8th Cir. 1996). When reviewing a motion to dismiss under Rule 12(b)(6), the Court presumes all factual allegations to be true and construes all reasonable inferences from them in favor of the non-moving party. Id.

Under the Federal Rules of Civil Procedure, if the court considers matters outside of the pleadings in a motion to dismiss under Rule 12(b)(6), the motion is transformed into a motion for summary judgment. Fed. R. Civ. P. 12(b)(6). Carlson has presented the Court with affidavits of several

experts who opine about the cause of Carlson's ejection from the car, and she urges the Court to consider them in deciding this motion. (See Enz Aff., Ziejewski Aff., Syson Aff.) The Court, however, will not do so. It will consider this Motion to Dismiss based solely upon the pleadings. See Skyberg v. United Food & Commercial Workers Int'l Union, 5 F.3d 297, 302 n.2 (8th Cir. 1993) (noting district court has wide discretion in electing to consider matters outside of the pleadings).

II. Effect of Minnesota's Seat Belt Gag Statute

Minnesota law limits the use of evidence regarding the use or non-use of seat belts.

> Proof of the use or the failure to use seat belts or a child passenger restraint system ... or proof of the installation or failure of installation of seat belts or a child passenger restraint system ... shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle.

Minn. Stat. § 169.685, subd. 4 (hereinafter, the "seat belt gag rule"). The Minnesota Supreme Court recently held that the seat belt gag rule "bars the introduction of evidence of a plaintiff, s personal seat belt use in a crashworthiness[2] action alleging the seat belt itself was negligently designed or

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[2] The crashworthiness doctrine applies to situations, like the instant case, in which "the defective design or manufacture of a vehicle does not actually cause a crash but instead increases the severity of injuries suffered by occupants." Olson, 558 N.W.2d at 494 n.2.

manufactured."[3] Olson v. Ford Motor Co., 558 N.W.2d 491, 496 (Minn. 1997).

Defendants argue that Carlson's claims must be dismissed in light of the seat belt gag rule and the Minnesota Supreme Court's decision in Olson. (Defs.' Mem. in Supp. of Mot. to Dismiss at 3-4.) ("Defs.' Mem.") Carlson's claims, they contend, rely upon proof that she used the car's seat belt, but it failed to properly restrain her. Carlson responds that the seal belt gag rule should not bar her claims because her "use or failure to use" a seat belt or the "'installation or non-installation" of a seat belt "is neither here nor there." (Pl.'s Mem. at 8.) Because she was "ejected from the [car] as a result of a number of separate and distinct reasons, i.e., seat belt failure, door frame failure, window integrity," her use or non-use of her seat belt is not at issue in the instant case. (Id.)

The Court finds that the seat belt gag rule bars Carlson's claims in the instant case. In her pleadings, Carlson alleged that she was wearing her seat belt, but it failed to keep her in the car when the door frame bent during the accident. (See Am. Compl. ¶ V.) Moreover, Carlson alleged that her injuries were a direct result of "the failure of the structure of the car and the shoulder harness to keep her within the automobile." (Id. ¶ VI.) Each of Carlson's claims requires proof that a defective product caused her injuries. See International Fin. Serv. v. Franz, 534 N.W.2d 261, 266 (Minn. 1995); (in breach of implied warranty of merchantability case, plaintiff must show "causal relationship between breach and the loss sustained"); Bilotta v. Kelley Co., 346 N.W.2d 616, 623 (Minn. 1984) (strict liability and negligent design claims). If

[3] In Olson, the Minnesota Supreme Court flatly rejected Carlson's argument that "the legislature did not include [the] exclusion of seat belt use or non-use in product liability/crashworthiness cases." (Pl.'s Obj. to Defs.' Mot. to Dismiss at 9.) ("Defs.' Mem.")

Carlson cannot offer evidence of how her seat belt was installed in the car and that she wore it during the accident, then she cannot prove that a defective seat belt caused her injuries. Based upon the face of her complaint, the seat belt gag rule precludes her claims.

Carlson argues that it would violate the equal protection and due process clauses of the Minnesota and federal constitutions, as well as the remedies clause of the Minnesota constitution, to find that the seat belt gag law precludes her claims. (Pl.'s Mem. at 1012.) Minnesota courts, however, have explicitly rejected these arguments, finding that the seat belt gag rule violates neither the remedies clause of the Minnesota constitution, nor the equal protection and due process clauses of either the Minnesota or the federal constitutions. See Olson, 558 N.W.2d at 496-497 (finding seat belt gag law did not violate remedies clause or due process and equal protection clauses of either state or federal constitutions); Anker v. Little, 541 N.W.2d 333, 339-40 (Minn. Ct. App. 1995) (same).

Finally, Carlson contends that the Court should allow her claims for a defective door/window frame to survive. (Pl.'s Mem. at 12-13.) She maintains that her "defective door frame and window integrity claims are entirely separate claims and are not dependent on the use or non-use of a seat belt." (Id. at 12.) Defendants respond that Carlson's Complaint "explicitly connects seat belt function and door/window frame integrity" and alleges that these "two components cooperated to cause [her] injury." (Defs'. Reply Mem. at 2, 4.)

The Court finds that Carlson has not alleged separate claims for defectively designed door and window frames. In her Amended Complaint, Carlson states that the combined failure of both the structure of the car and the seat belt system caused her injuries. (See Am. Compl. ¶ VI ("injuries sustained

as a direct result of the failure of the structure of the car and the shoulder harness to keep her within the automobile"), ¶¶ IX, XV ("the defective and unreasonably dangerous condition of the passive seat belt system and door frame and the vehicle were the direct cause" of [Carlson's] injuries), ¶ XVII ("the injuries sustained by ... Carlson which resulted from her use of the 1991 Hyundai Excel's passive seat belt system and door frame were directly caused by the negligence of defendant Hyundai Motor Company") (emphasis added)). Nowhere in her Amended Complaint does Carlson state that a defect in the door frame alone caused her injuries. Thus, as alleged, all of Carlson's claims are dependent upon evidence of her use of the car's seat belt, and the joint failure of it and the door frame to prevent her from being ejected from the car. Because the seat belt gag rule prohibits Carlson from introducing any evidence regarding her use of the seat belt, Carlson's success here is impossible. The Court, therefore, will grant Defendants' Motion in its entirety.

Conclusion

Based on the foregoing, and upon all the files, records, and proceedings herein, **IT IS ORDERED** that Defendants' Motion to Dismiss (Doc. No. 33) is **GRANTED,** and Plaintiff's Amended Complaint (Doc. No. 15) is **DISMISSED WITH PREJUDICE.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

June 13, 1997

/s/
RICHARD H. KYLE
United States District Judge

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-3103

Jodi Michaelle Carlson,	*	
	*	
Plaintiff - Appellant,	*	
	*	Appeal from the United
v.	*	States District Court for the
	*	District of Minnesota.
Hyundai Motor Company;	*	
Hyundai Motor America,	*	
Inc.,	*	
	*	
Defendants - Appellees.	*	

Submitted: June 10, 1998
Filed: January 15, 1999

Before LOKEN and HEANEY, Circuit Judges, and JONES,* District Judge.

LOKEN, Circuit Judge.

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* The HONORABLE JOHN B. JONES, United States District Judge for the District of South Dakota, sitting by designation.

In this diversity action, Jodi Michaelle Carlson appeals the district court's[1] dismissal of her strict liability, negligence, and breach of warranty claims against Hyundai Motor Company and Hyundai Motor America, Inc. The district court concluded that Minn. Stat. § 169.685, subd. 4, known colloquially as the seat belt gag rule, bars these claims. We affirm.

In April 1995, Carlson was a passenger in a Hyundai Excel automobile that left the road and rolled over. Though she was wearing a seat belt and a shoulder harness anchored to the door frame, Carlson was thrown from the vehicle through an opening in the upper rear portion of the front passenger door because, in the words of Carlson's Amended Complaint, "when the doorframe bent out it eliminated any effective passenger restraint." Carlson suffered serious injuries. In 1996, she brought this action in Minnesota state court, seeking substantial damages. The non-resident defendants removed.

All of Carlson's claims are premised upon a crashworthiness theory -- that the Hyundai vehicle had a defectively designed and manufactured seat belt system and door frame that caused Carlson to be ejected during the accident, resulting in substantially greater injuries than had she remained in the vehicle. For example, Paragraph XI of Carlson's Amended Complaint alleges that Hyundai Motor Company is strictly liable because "[t]he defective and unreasonably dangerous condition of the passive seat belt system and door frame and the vehicle were the direct cause of the injuries and damage sustained by plaintiff."

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[1] The HONORABLE RICHARD H. KYLE, United States District Judge for the District of Minnesota.

The statute in question, Minn. Stat. § 169.685, subd. 4, provides that "[p]roof of the use or failure to use seat belts ... or proof of the installation or failure of installation of seat belts . . . shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle." This statute was enacted in 1963, before Minnesota courts recognized crashworthiness as a theory of common law liability. In Olson v. Ford Motor Co., 558 N.W.2d 491 (Minn. 1997), the Minnesota Supreme Court held that the statute applies to crashworthiness claims and effectively bars all such claims that are premised upon allegedly defective seat belt systems.

Relying upon Olson and the contemporaneous Minnesota Court of Appeals decision in Schlotz v. Hyundai Motor Co., 557 N.W.2d 613 (Minn. App.), cert. denied, 118 S. Ct. 80 (1997), defendants moved to dismiss this action as barred by § 169.685, subd. 4. After the Governor of Minnesota vetoed a bill that would have materially amended the statute, the district court granted this motion. The court explained that Carlson's claim of a defective seat belt system is barred under Olson because, "If Carlson cannot offer evidence of how her seat belt was installed in the car and that she wore it during the accident, then she cannot prove that a defective seat belt caused her injuries." The court further held that Carlson's claim of a defective door and window frame are also barred by the seat belt gag rule because, "Nowhere in her Amended Complaint does Carlson state that a defect in the door frame alone caused her injuries. Thus, as alleged, all of Carlson's claims are dependent upon evidence of her use of the car's seat belt, and the joint failure of it and the door frame to prevent her from being ejected from the car."

On appeal, Carlson concedes the district court (1) appropriately dismissed her seat belt allegations, and (2)

"correctly concluded that the seat belt allegations were intertwined with the allegations that the car was defectively designed, manufactured, and otherwise dangerously deficient." However, Carlson argues, the court abused its discretion by dismissing her claims without inviting her to amend the complaint to assert independent claims based upon the allegedly defective door and window frame. This contention was not properly preserved. Carlson did not ask the district court for leave to file a second amended complaint, either before or after the court granted defendants' motion to dismiss her amended complaint. A district court does not abuse its discretion in failing to invite an amended complaint when plaintiff has not moved to amend and submitted a proposed amended pleading. See Oliver v. resolution Trust Corp., 955 F.2d 583, 585 (8th Cir. 1992); Clayton v. White Hall Sch. Dist., 778 F.2d 457, 460 (8th Cir. 1985).

Even if Carlson had properly preserved this issue in the district court, we conclude that her proposed second amended complaint must be rejected as futile. See Williams v. Little Rock Mun. Water Works, 21 F.3d 218, 225 (8th Cir. 1994) ("Good reason to deny leave to amend exists if the amendment would be futile."). Carlson argues she has a viable claim independent of the allegedly defective seat belt system because, during the accident:

> the door frame was caused to deform causing an opening which allowed the ejection of Jodi Carlson. The seat belt mechanism was not significantly related to the creation of this hole. If she had had her seat belt on she would have been ejected and if she had not had her seat belt on she would have been ejected. Accordingly, there is no reason to refer to the seat belt mechanism in this case.

However, the issue in a crashworthiness case is whether the vehicle design *as a whole* evidences the manufacturer's failure to use reasonable care to prevent auto accident injuries. See O'Grady, Minnesota's Seat Belt Evidence Gag Rule: Antiquated and Unfair in Crashworthiness Cases, 15 WM. MITCHELL L. REV. 353, 367-69 (1989), and cases cited. The seat belt gag rule does not bar evidence by Hyundai that its seat belt system was designed to prevent passengers from being ejected from the vehicle during accidents. But while that evidence is admissible, § 169.685, subd. 4, bars Carlson from introducing evidence that the seat belt system was installed, in use, and failed to prevent her ejection. If Carlson cannot prove that the seat belt system failed of its essential crashworthiness purpose, then she cannot prove that Hyundai failed to use reasonable care to prevent accident injuries in its vehicle design as a whole. In other words, like the seat belt system and seat back at issue in Schlotz, and the airbag and seat belt system discussed by Justice Page in his concurring opinion in Olson, 558 N.W.2d at 498, the alleged defects in the Hyundai seat belt system and door frame were inseparably intertwined in causing Carlson's increased injuries. In these circumstances, any amended complaint attempting to separate the two alleged defects so as to prevent application of § 169.685, subd. 4, to bar Carlson's claims would be futile.

Finally, Carlson argues the district court erred in dismissing defendant Hyundai Motor Company because that Korean company was never served and thus the court lacked personal jurisdiction to grant a judgment in its favor. We disagree. Carlson failed to raised this issue in the district court and therefore may not raise it on appeal. Moreover, Hyundai Motor Company voluntarily appeared in the district court and joined in defendants' Rule 12(b)(6) motion to dismiss

without contesting the court's personal jurisdiction, thereby waiving that issue. See Fed. R. Civ. P. 12(h)(1). "Because the requirement of personal jurisdiction represents first of all an 'individual right . . . an individual may submit to the jurisdiction of the court by appearance." Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982). In this case, Hyundai Motor Company consented to the district court's jurisdiction by voluntarily appearing and is entitled to the *res judicata* effect of the court's judgment in its favor.

The judgment of the district court is affirmed.

HEANEY, Circuit Judge, dissenting.

From this day forward, passengers thrown from a vehicle due to an alleged structural defect are precluded from pursuing crashworthiness claims under Minnesota law. In my view, this result is mandated by neither the seat belt gag rule nor the decisions of the Minnesota Supreme Court. Accordingly, I respectfully dissent,

The Minnesota seat belt gag rule, enacted in 1963, precludes introduction of any evidence pertaining to seat belt use or nonuse in a suit involving "'personal injury resulting from the use of a motor vehicle.'" Olson v. Ford Motor Co., 558 N.W.2d 491, 494 (Minn. 1997) (quoting Swelbar v. Lahti, 473 N.W.2d. 77, 79 (Minn. Ct. App. 1991)). Five years after the legislature enacted the seat belt gag rule, this court recognized the crashworthiness doctrine, which imposes liability for injuries exacerbated, rather than caused, by defective design or manufacture of a vehicle. See Larsen v. General Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968). In Larsen, we held that an automobile manufacturer "is under a

duty to use reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision." Id. at 502. We explained:

> Any design defect not causing the accident would not subject the manufacturer to liability for the entire damage, but the manufacturer should be liable for that portion of the damage or injury caused by the defective design over and above the damage or injury that probably would have occurred as a result of the impact or collision absent the defective design.

Id. at 503. In Mitchell v. Volkswagenwerk, AG, we elaborated:

> [T]he extent of the manufacturer's liability depends upon whether or not the injuries involved are divisible such that the injuries can be clearly separated and attributed either to the manufacturer or the original tortfeasor. If the manufacturer's negligence is found to be a substantial factor in causing an indivisible injury such as paraplegia, death, etc., then absent a reasonable basis to determine which wrongdoer actually caused the harm, the defendants should be treated as joint and several tortfeasors.

669 F.2d 1199,1206 (8th Cir. 1982) (citing Mathews v. Mills, 178 N.W.2d. 841 (Minn. 1970)).

When the seat belt gag rule was enacted, there "was still considerable debate as to the efficacy of seat belts as a safety device." Olson, 558 N.W.2d at 495. In 1986, the Minnesota legislature formally ended the debate by enacting legislation

requiring seat belt use. See Minn. Stat. Ann. § 169.686 (West Supp. 1999). The Minnesota Supreme Court has noted that the legislature may not have solely intended "to protect a plaintiff from being penalized for contributory negligence for failure to wear a seat belt" by enacting the seat belt gag rule. Olson, 558 N.W.2d at 495. Instead, the legislature intended to strike a balance between car crash victims and auto manufacturers. See id. Contrary to the majority's holding, there is no evidence suggesting that the legislature intended the seat belt gag rule to preclude all crashworthiness claims when a passenger is thrown from a vehicle and alleges structural defect.[2] In fact, by construing the seat belt gag rule so broadly, the majority ignores the balance struck by the legislature and, instead, virtually immunizes auto manufacturers from crashworthiness claims as long as seat belts were installed in the vehicle.

Here, Carlson wishes to amend her complaint to assert that the opening created when the roof of her car peeled off during the crash stated a cause of action under the crashworthiness doctrine. She argues that she would have been thrown from the vehicle regardless of whether she was wearing a seat belt. The majority asserts that since Carlson cannot introduce evidence stating that the seat belt system was in use and failed to prevent ejection and since "the alleged defects in the Hyundai seat belt system and door frame were

---

[2] While the court of appeals' decision in Schlotz may suggest a contrary result, we are not bound by that decision, see Horstmyer v. Black & Decker, Inc., 151 F.3d 765, 773-74 n.10 (8th Cir. 1998), and I do not read it as a final statement of the law by Minnesota's highest court. In fact, the Minnesota Supreme Court decision in Olson came out almost a full month after Schlotz, yet did not even refer to Schlotz and its expansive interpretation of the seat belt gag rule. I therefore do not believe that the Minnesota Supreme Court would adopt the view endorsed by the majority.

inseparably intertwined in causing Carlson's increased injuries," she "cannot prove that Hyundai failed to use reasonable care to prevent accident injuries in its vehicle design as a whole." I do not read "as a whole" so narrowly nor do I see the logical or legal necessity in raising the seat belt issue to determine whether Hyundai was negligent in the design of the vehicle.[3] In short, the facts of each car crash will vary, and the jury, rather than a federal court of appeals sitting in a diversity action, is the proper body to determine whether an auto manufacturer exercised reasonable care in the design or manufacture of a vehicle. It is entirely inappropriate for this court to decide the issue as a matter of law.

Under these circumstances, I disagree with the majority's conclusion that Carlson's proposed second amended complaint must be rejected as futile and would remand the case so the district court could entertain her motion to amend her complaint. Accordingly, I respectfully dissent.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

---

[3] I concede that, absent the seat belt gag rule, knowing whether a passenger was wearing her seat belt may be relevant in determining whether her injuries were exacerbated by the defective design or manufacture of the vehicle. It is possible, however, that a design defect would exacerbate injury regardless of whether a seatbelt mechanism exists or is in use.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3103MND

Jodi Michaelle Carlson,	*	
	*	
Appellant,	*	
	*	Order Denying Petition for
vs.	*	Rehearing and for Rehearing
	*	En Banc
Hyundai Motor Company; Hyundai Motor America, Inc.,	*	
	*	
	*	
Appellees.	*	

The petition for rehearing en banc is denied. Judge McMillian would grant the petition. The petition for rehearing by the panel is also denied.

March 5, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

January 18, 1999 sa

RECORD OF DOCKET TEXT

6:96-cv-00228 Carlson v. Hyundai Motor Comp

DOCKET ENTRY

CERTIFIED COPY OF OPINION FROM USCA (Loken) (Heaney) (Jones) - J; filed 1/15/99 affirming the decision of the District Court [54-1] as to Jodi Michaelle Carlson (8 pgs)

Hon. Richard H Kyle, Judge

THIS NOTICE SENT TO ALL COUNSEL

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3103MND

Jodi Michaelle Carlson,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
vs.	*	District Court for the
	*	District of Minnesota
Hyundai Motor Company; Hyundai Motor America, Inc.,	*	
	*	
	*	
Appellees.	*	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

January 15, 1999

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

No. 99

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

JODI MICHAELLE CARLSON,

Plaintiff-Petitioner,

vs.

HYUNDAI MOTOR CO., et al.

Defendant-Respondent.

APPLICATION FOR EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit:

COMES NOW THE PETITIONER and moves this Court for an Order for an extension of time to petition for writ of certiorari. The Petitioner specifically requests 60 days

beyond the June 15, 1999 deadline for filing of her petition for writ of certiorari to and including August 14, 1999.

A. Jurisdiction.

The Petitioner submits that 28 U.S.C. § 1254 (1) confers jurisdiction on the United States Supreme Court to review this judgment by writ of certiorari. On Certiorari, the Petitioner plans to seeks this Court to review the Eighth Circuit Court of Appeals initial Decision filed January 15, 1999. Following this January 1999 decision, the Petitioner sought rehearing and rehearing en banc. Both requests were denied by Order dated March 17, 1999. Judgment was entered on March 17, 1999 and the Petitioner's time to petition for certiorari in this Court expires on June 15, 1999. Copies of the majority and dissent opinions are attached hereto.

B. Statement of Case and Rulings.

As shown by the opinion below, Jodi Carlson was seriously injured in a rollover accident while she rode as a passenger in a Hyundai. Ms. Carlson filed suit against the Respondents claiming in part that the Respondents installed a defectively designed seat belt in the vehicle in which she rode. The Respondents filed a motion to dismiss in federal district court. This motion was granted with a finding that the Petitioner's seat belt claims were intertwined with her other claims such that all of her claims were barred by Minn.Stat. § 169.685, subdivision 4. This determination has been affirmed through the appeal process.

C. Reason for Request for Extension.

The Petitioner seeks an extension in time to file her Writ of Certiorari given a recent change in Minnesota law which materially effects her claims and which was specifically made applicable to all pending claims.

On or about May 17, 1999, the Minnesota Legislature overturned Governor Jesse Ventura's veto of the amended Minn.Stat. § 169.685. The veto effectively codifies the following as Minn.Stat. § 169.685, subdivision 4:

Section 1. Minnesota Statutes 1998, section 169.685, subdivision 4, is amended to read:

> (a) Except as provided in paragraph (b), proof of the use or failure to use seat belts or a child passenger restraint system as described in subdivision 5, or proof of the installation or failure of installation of seat belts or a child passenger restraint system as described in subdivision 5 shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle.
>
> (b) Paragraph (a) does not affect the right of a person to bring an action for damages arising out of an incident that involves a defectively designed, manufactured, installed, or operating seat belt or child passenger restrain system. Paragraph (a) does not prohibit the introduction of evidence pertaining to the use of a seat belt or child passenger restraint system in an action describe in this paragraph.

Section 2. Section 1 is effective the day following final enactment and applies to actions pending on or commenced on or after the effective date.

Prior to this change, Minn.Stat. § 169.865, subdivision 4 was interpreted to exclude claims based on defective seat belt decision. In light of the recent statutory change to Minn.Stat. § 169.685, subdivision 4 which creates a cause of action for defective seat belts which cause personal injuries and the pending status of the Petitioner's claims against the Respondents in the above-captioned matter, the Petitioner moved, on May 21, 1999, for reinstatement of her Complaint and that her claim be allowed to proceed. Granting this extension may render the Petitioner's claims which she plans to bring before the Court on Certiorari moot assuming her case is reinstated as a result of the change in the above-referencedlaw.[1]

D. Prayer for Relief.

Wherefore, Petitioner respectfully requests that an Order be entered extending her time to petition for certiorari to and including August 14, 1999.

Dated: June 2, 1999 Respectfully submitted,

Carol Lynn O'Gara, #290320
Counsel of Record
1145 James Avenue

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[1] *C.f.* Zipes v. TWA, 442 U.S. 916 (1979), 455 U.S. 385, 390 (1982) (Court granted motion to defer consideration of petition for certiorari because of pendency of resolution of disputed issues).

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Attorneys for Plaintiff-Petitioner
Jodi Michaelle Carlson

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

No. 97-3103

JODI MICHAELLE CARLSON,

Appellant,

vs.

HYUNDAI MOTOR CO., et al.

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, SIXTH DIVISION THE HONORABLE RICHARD M. KYLE, JUDGE
District Court No. 6-96 Civil 228

MOTION FOR REINSTATEMENT AND MEMORANDUM

COMES NOW THE APPELLANT-PLAINTIFF and moves this Court for an Order to reinstate her Complaint in light of the recent changes to Minn.Stat. § 169.685 which

creates a cause of action for injuries resulting from the use of a defectively designed seat belt in the State of Minnesota.

MEMORANDUM IN SUPPORT OF MOTION

On March 17, 1999, Judgment was filed by the United States Eighth Circuit Court of Appeals following the denial of rehearing and rehearing en banc. Following this determination, the Appellant-Plaintiff began preparations for an appeal to the United States Supreme Court by Certiorari pursuant to Supreme Court Rules 12, 13 and 14.[1] This Petition for Certiorari is due to be filed on or before June 15, 1999.

On or about May 17, 1999, the Minnesota Legislature overturned Governor Jesse Ventura's veto of the amended Minn.Stat. § 169.685. The veto effectively codifies the following as Minn.Stat. § 169.685, subdivision 4:

> Section 1. Minnesota Statutes 1998, section 169.685, subdivision 4, is amended to read:
>
> (a) Except as provided in paragraph (b), proof of the use or failure to use seat belts or a child passenger restraint system as described in subdivision 5, or proof of the installation or failure of installation of seat belts or a child passenger restraint system as described in subdivision 5 shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle.

---

[1] *See* Affidavit of Harry A. Sieben.

(b) Paragraph (a) does not affect the right of a person to bring an action for damages arising out of an incident that involves a defectively designed, manufactured, installed, or operating seat belt or child passenger restrain system. Paragraph (a) does not prohibit the introduction of evidence pertaining to the use of a seat belt or child passenger restraint system in an action describe in this paragraph.

Section 2. Section 1 is effective the day following final enactment and applies to actions pending on or commenced on or after the effective date.[2]

With regard to changes in state law during the pendency of an action, the Court's duty to mirror state law does not end with the entry of judgment, but rather the Appellate Court must apply states law and give effect to any change in state law occurring subsequent to the Court's decision under review by the Court of Appeals or the United States Supreme Court.[3] Wright & Miller explain:

> If during the pendency of an action in federal court state law changes or a previously open or ambiguous question of state law is resolved or clarified, the federal court must take this into account and reverse

---

[2] *See* Exhibit A to Affidavit of Harry A. Sieben.

[3] *See* Wright & Miller, Federal Practice and Procedure, Jurisdiction 2d § 4507 (1996) *citing* Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941). See also Blair v. Sealift, Inc., 91 F.3d 755 (5th Cir. 1996).

or revise its earlier determination of state law accordingly.[4]

In light of the recent statutory change to Minn.Stat. § 169.685, subdivision 4 which creates a cause of action for defective seat belts which cause personal injuries and the pending status of her claims against the Respondent-Defendants in the above-captioned matter, the Appellant-Plaintiff respectfully requests that her Complaint be reinstated and that her claim be allowed to proceed.

DATED: 5/19/99

Respectfully submitted,

/s/

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Attorneys for Appellant
Jodi Michaelle Carlson

[4] Wright & Miller, Federal Practice and Procedure, Jurisdiction 2d § 4507, page 207 (1996) *citations omitted.*

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

No. 97-3103

JODI MICHAELLE CARLSON,

Appellant,

vs.

HYUNDAI MOTOR CO., et al.

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, SIXTH DIVISION THE HONORABLE RICHARD M. KYLE, JUDGE
District Court No. 6-96 Civil 228

AFFIDAVIT OF HARRY A. SIEBEN

STATE OF MINNESOTA)
)
COUNTY OF HENNEPIN)

Harry A. Sieben, being duly sworn on oath, hereby states and deposes as follows:

I.

That, he is an attorney for the law firm of Sieben, Grose, VonHoltum, McCoy & Carey, 900 Midwest Plaza East, Eighth and Marquette, Minneapolis, Minnesota 55402, which has been retained to represent Jodi Carlson for injuries she sustained causing her to became an incomplete C5-C6 quadriplegic as the result of being ejected from a Hyundai Excel.

II.

That, he is thoroughly familiar with the facts and circumstances surrounding the incident of this subject matter.

III.

That, the Plaintiff is in the process of preparing a Petition for Writ of Certiorari to the United States Supreme Court in the above-captioned matter which is due to be filed in June of 1999.

IV.

That, attached as Exhibit A is a true and correct copy of Chapter 106, Senate File No. 303, amending Minn. Stat. § 169.685, subdivision 4 which has passed by the Minnesota Legislature on or about May 17, 1999 effectively overriding the veto of Minnesota Governor Jesse Ventura.

V.

That, attached as Exhibit B is a true and correct copy of the Journal of The House, Motion to Override Veto, amending Minn. Stat. § 169.685, subdivision 4 which has passed by the Minnesota Legislature on or about May 17, 1999 effectively overriding the veto of Minnesota Governor Jesse Ventura.

FURTHERYOURPETITIONERSAYETHNOT.

/s/
Harry A. Sieben

Subscribed and Sworn to me this
20th day of May, 1999.

/s/ Shelly M. Ferneluis
Notary Public

"EXHIBITA"

CHAPTER No. 106
S.F. No. 303

VETOED

AN ACT

relating to civil actions; clarifying admissibility of evidence regarding seat belts and child passenger restraint systems in certain actions; amending Minnesota Statutes 1998, section 169.685, subdivision 4.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. Minnesota Statutes 1998, section 169.685, subdivision 4, is amended to read:

Subd. 4. [ADMISSIBILITY INTO EVIDENCE.) (a) Except as provided in paragraph (b), proof of the use or failure to use seat belts or a child passenger restraint system as described in subdivision 5, or proof of the installation or failure of installation of seat belts or a child passenger restraint system as described in subdivision 5 shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle.

(b) Paragraph (a) does not affect the right of a person to bring an action for damages arising out of an incident that involves a defectively designed, manufactured, installed, or operating seat belt or child passenger restraint system. Paragraph (a) does not prohibit the introduction of evidence pertaining to the use of a seat belt or child passenger restraint system in an action described in this paragraph.

Sec. 2. (EFFECTIVE DATE; APPLICATION.]

Section 2

STATE OF MINNESOTA
OFFICE OF GOVERNOR JESSE VENTURA
130 State Capitol • 75 Constitution Avenue • Saint Paul, MN 55155

April 27, 1999

The Honorable Allan Spear
President of the Senate
120 Capitol
Saint Paul, Minnesota 55155

Dear President Spear:

I have vetoed and am returning Chapter Number 106, Senate File Number 303, a bill to partially repeal the seat belt gagrule.

It is not the place of the legislature or the executive branch to determine what evidence is, or is not, admissible in a court of law. By partially repealing the seat belt gag rule, an unfair advantage will be given to one party in the courtroom. juries should hear all of the arguments and facts in a case before rendering a decision.

Additionally, the enactment date of this bill is immediate and would affect pending litigation. I believe that it is wrong to enact legislation that favors one party over another and that will affect the outcome of pending litigation.

After two vetoes of the same partial repeal, I expect the legislature to introduce a bill to repeal the entire seat belt gag rule. Only a full repeal will ensure citizens the right to introduce evidence at trial that is germane to their cases and

allow the other party to refute that evidence on the same terms. Given the obvious interest in this issue, I look forward to signing into law a full repeal of the seat belt gag rule next year.

Sincerely,

/s/

Jesse Ventura
Governor

"EXHIBITB"

MOTION TO OVERRIDE VETO

Fuller, McGuire and Tuma moved that S. F. No. 303. Chapter No. 106, be now reconsidered and repassed, the objections of the Governor notwithstanding, pursuant to Article IV, Section 23, of the Constitution of the State of Minnesota.

The question was taken on the Fuller et al motion to reconsider and repass S. F. No. 303, Chapter 106, the objections of the Governor notwithstanding, pursuant to Article IV, Section 23, of the Constitution of the State of Minnesota.

Pawlenty moved that those not voting be excused from voting. The motion prevailed.

There were 109 yeas and 19 nays as follows:

Those who voted in the affirmative were:

Abeier	Broecker	Dorman	Gleason
Abrams	Buesgens	Dorn	Goodno
Anderson, B.	Carlson	Entenza	Gray
	Cassell	Erhardt	Greenfield
Anderson, I.	Chaudnary	Erickson	Greiling
Bakk	Clark, J.	Finseth	Gunther
Biernal	Daggett	Folhard	Haas
Boudreau	Dawkins	Fuller	Hackbarth
Bradley	Dehler	Gerlach	Harder

Hasskamp	Lenczewski	Pawlenty	Stang
Hilty	Leppik	Paymar	Storm
Howes	Lieder	Pelowski	Sykora
Huntley	Lindner	Peterson	Tingelstad
Jaros	Mahoney	Pugh	Tomassoni
Jennings	Mariani	Rest	Trimble
Johnson	Marko	Reuter	Tuma
Juhnke	McCollum	Rhodes	Tunheim
Kahn	McGuire	Rifenberg	Vandeveer
Kalis	Molnau	Rostberg	Wagenius
Kelliher	Mullery	Rokavina	Wejcman
Kielkucki	Munger	Schumacher	Wenzel
Knoblach	Murphy	Seagren	Westerberg
Koskinen	Nornes	Seifert, J.	Westfall
Kubly	Olson	Skoe	Wilkin
Kuisle	Opatz	Skoglund	Winter
Larsen, P.	Orfield	Smith	Spk. Sviggum
Larson, D.	Osthoff	Solberg	
Leighton	Paulsen	Stanek	

Those who voted in the negative were:

Davids	Krinkie	Ness	VanDellen
Dempsey	Luther	Osskopp	Westrom
Haake	Mares	Ozment	Wolf
Holberg	Milbert	Seifert, M.	Workman
Holsten	Mulder	Swenson	

Having received the constitutionally required two-thirds vote, the bill was reconsidered and repassed.

The following Conference Committee Reports were received:

CONFERENCE COMMITTEE REPORT ON H. F. NO. 2397

A bill for an act relating to transportation; appropriating money for the department agencies; providing for a maximum percentage of the motorcycle safety fund that may be spent for certain activities; authorizing suspension of a vehicle's registration in certain circumstances; requiring a detachable postcard to be

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Jodi Michaelle Carlson,

Plaintiff, Civil No. 6-96-228 (RHK/RLE)

vs. **ORDER**

Hyundai Motor Company, a South Korean corporation; and Hyundai Motor America, Inc., a California corporation,

Defendants.

Before the Court is Plaintiff's Motion, pursuant to Fed. R Civ. P. 60(b)(6), to Vacate Judgment on Basis of New Statutory Law. The Motion is opposed and has been briefed by the parties. Being of the view that oral argument would not assist in the resolution of the issue presented by the instant Motion, the parties' request therefore has been denied.

Judgment in favor of Defendants dismissing Plaintiff's Complaint was entered two years ago – on June 17, 1997. Plaintiff's appeal to the Eighth Circuit was unsuccessful and the judgment of this Court was affirmed on January 15, 1999; Plaintiff's Petition for Rehearing En Banc was denied on March 5, 1999; the Mandate from the Eighth Circuit issued on March 15, 1999 and was filed with this Court on March 17, 1999. Plaintiff's application to the United States Supreme Court for an extension of time within which to file a petition for a writ of certiorari was denied on June 7, 1999, as having been filed "out-of-time."

From the foregoing procedural history, this action was neither "pending on" nor "commenced on or after" May 18,

1999 -- the effective date of legislation which was amended as M.S.A. § 169.685, subd. 4.

Accordingly, and upon all the files, records, and proceedings herein, **IT IS ORDERED** that Plaintiff's Motion to Vacate Judgment on Basis of New Statutory Law (Doc. No. 57) is **DENIED**.

June 28, 1999

s/
RICHARD H. KYLE
United States District Judge

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-3103

Jodi Michaelle Carlson,	*	
	*	
Plaintiff - Appellant,	*	
	*	Appeal from the United
v.	*	States District Court for the
	*	District of Minnesota.
Hyundai Motor Company;	*	
Hyundai Motor America, Inc.,	*	
	*	
Defendants - Appellees.	*	

Submitted: June 16, 2000

Filed: August 15, 2000

Before LOKEN, ROSS, and HANSEN, Circuit Judges.

LOKEN, Circuit Judge.

Jodi Michaelle Carlson was seriously injured in an April 1995 automobile accident. She commenced this action, alleging that a defective seat belt system and door frame caused her injury-enhancing ejection from a Hyundai Excel automobile when it left the road and rolled over. The district court concluded that Minnesota's "seat belt gag rule," codified in Minn. Stat. § 169.685, subd. 4, barred Carlson's

claims. This court affirmed and later denied Carlson's petition for rehearing en banc. See Carlson v. Hyundai Motor Co., 164 F.3d 1160 (8th Cir. 1999). Our mandate issued on March 15, 1999, and a certified copy of our mandate was filed in the district court as its final judgment on March 17, 1999.

One month later, the Minnesota Legislature amended § 169.685, subd. 4, to provide that it "does not affect the right of a person" to bring an action for damages based on a defective seat belt claim. The amendment was vetoed by the Governor of Minnesota, but the Legislature overrode his veto and the amendment became law on May 18, 1999. The amended statute provides that it "applies to actions pending on or commenced on or after the effective date." 1999 Minn. Laws ch. 106, § 2. Carlson then returned to the district court, filing a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate its final judgment on the basis of this new statute. The district court denied that motion because Carlson's action was neither pending on nor commenced on or after May 18, 1999. Carlson appeals. We affirm.

Carlson argues the case was "pending" on May 18, the effective date for the new statute, because her time to petition the United States Supreme Court for a writ of certiorari had not yet expired. We disagree. "Pending" means "awaiting decision." BLACK'S LAW DICTIONARY 1154 (7th ed. 1999). Carlson's case was not pending in this court because we issued our mandate ending the first appeal on March 15, 1999. "Issuance of the mandate formally marks the end of appellate jurisdiction. Jurisdiction returns to the tribunal to which the mandate is directed, for such proceedings as may be appropriate...." Johnson v. Bechtel Assoc. Prof. Corp., 801 F.2d 412, 415 (D.C. Cir. 1986); see United States v. Spector, 888 F.2d 583, 584 (8th Cir. 1989); 20A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 341.12[3] (3d ed. 2000). Her case was not pending in the district court because that court filed our mandate as its final judgment on March 17, signaling conclusion of proceedings. And her case

was not pending in the Supreme Court because Carlson did not petition the Supreme Court for a writ of certiorari on or before May 18. (Indeed, Carlson never filed a timely certiorari petition, and on June 7, 1999, the Supreme Court rejected her untimely application for an extension of time in which to file a certiorari petition.) Thus, on May 18, Carlson's case was not awaiting decision by any court.

In these circumstances, the district court did not abuse its discretion when it denied Carlson's motion for Rule 60(b) relief. See United States v. Young, 806 F.2d 805, 806 (8th Cir. 1986) (standard of review), cert. denied, 484 U.S. 836 (1987). "Generally, a change in the law that would have governed the dispute, had the dispute not already been decided, is not by itself an extraordinary circumstance" warranting Rule 60(b) relief from a final judgment. Kansas Public Employees Retirement Sys. v. Reimer & Koger Assoc., 194 F.3d 922, 925 (8th Cir. 1999), cert. denied, 120 S. Ct. 1268 (2000). Here, an exception to this general rule would not help Carlson -- the new Minnesota statute would not govern her claim because her action was not pending on the date of its enactment. Carlson argues on appeal that the new statute would apply because the effect of granting Rule 60(b) relief would be to commence a new action. But she cites no authority for that theory, and we conclude it is unsound.

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-3103MND

Jodi Michaelle Carlson,	*	
	*	
Appellant,	*	
	*	Order Denying Petition
v.	*	for Rehearing and for
	*	Rehearing En Banc
Hyundai Motor Company,	*	
et al.,	*	
	*	
Appellees.	*	

The petition for rehearing en banc is denied. Petition for rehearing by the panel is also denied.
(5128-010199)

September 19, 2000

Order Entered at the Direction of the Court:
s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

(2)

Supreme Court, U.S.
FILED
JAN 3 2000
CLERK

No. 00-936

In The

Supreme Court of the United States

JODI MICHAELE CARLSON,

Petitioner,

v.

HYUNDAI MOTOR COMPANY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

The Eighth Circuit made a commonplace procedural ruling in an unpublished decision, holding that Rule 60(b) does not compel a district court to vacate a "non-pending case's judgment" (petitioner's own description here, Pet. 9) based on new law that on its face applies only to "pending" cases. Indeed, Petitioner's Rule 60(b) motion was self-canceling: had an action been "pending," petitioner would not need to invoke Rule 60(b).

Petitioner conjures three issues out of that ruling, but none is an issue at all, much less appropriate for review. The first and second issues involve a fact-bound exercise of discretion, and essentially posit an absurd proposition: that a trial court has a Rule 60(b) duty to rewrite state law to apply to a case to which, on the statute's face, it does not apply. No case has held that, with good reason; it is settled law that federal courts follow, not fashion, state law, and have no discretion to do otherwise.

As to the third issue (relating to the constitutionality of the earlier Minnesota law, Minnesota Statute § 169.685), it is not properly before this Court twice over: (1) no constitutional issue ever was raised in the Court of Appeal; and (2) petitioners did not timely tender it to this Court in any event.

The Petition should be denied.

STATEMENT OF THE CASE

Petitioner's statement of the case leaves out key facts that show why certiorari is inappropriate. Here is the complete story:

The underlying action in this case was filed in 1996, claiming a defective seat belt. (Petitioner's Appendix ("Pet. App.") A-1) On June 16, 1997, the district court dismissed petitioner's complaint on the grounds that, under settled Minnesota law,[1] petitioner's claims would require evidence about seat belt use and installation, which was barred by Minn. Stat. § 169.685. (Pet. App. A-1)

Petitioner appealed to the Eighth Circuit Court of Appeals. She did not challenge the statute's application to her case, nor its constitutionality. To the contrary, she conceded the trial court "appropriately dismissed her seat belt allegations" but argued "the court abused its discretion by dismissing her claims without inviting her to amend the complaint. . . . " *See Carlson v. Hyundai Motor Co.*, 164 F.3d 1160, 1162 (8th Cir. 1999).

On January 15, 1999, the Eighth Circuit affirmed. *See Carlson*, 164 F.3d 1160. Petitioner rehashed her arguments in a petition for rehearing and rehearing *en banc*. Although she was actively lobbying for legislative change

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[1] *See Olson v. Ford Motor Co.*, 558 N.W.2d 491 (Minn. 1997); *Altimus v. Hyundai Motor Co.*, 578 N.W.2d 409, 412 (Minn. Ct. App. 1998); *Schlotz v. Hyundai Motor Co.*, 557 N.W.2d 613 (Minn. Ct. App. 1997), *rev. den.* (Minn. Mar. 26, 1997), *cert. den.*, 118 S.Ct. 80 (1997); *Anker v. Little*, 541 N.W.2d 333 (Minn. Ct. App. 1995), *rev. denied* (Minn. Feb. 9, 1996).

at the time, her petition made no mention of any impending change of law, nor raised any constitutional challenge to the existing law. The petitions were denied on March 5, 1999. (Pet. App. A-17)

Petitioner did not ask for a stay of the mandate, much less make the required showing that, in this case involving state law, a certiorari petition "would present a substantial question." F.R.A.P. 41(d)(2)(A). The mandate accordingly issued on March 15, 1999. (Pet. App. A-19) The judgment of the Court of Appeals was received and filed by the district court on March 17, 1999. (Pet. App. A-19)

Petitioner did not seek to recall the mandate pending legislative changes. She also did not file a certiorari petition. To the contrary, she let the time run, then moved for an extension of time to petition for certiorari. This Court advised her that the time to file a petition had already run, and that "[w]hen the time to file a petition for a writ of certiorari in a civil case has expired (including any habeas action), the Court no longer has the power to review the petition or to consider an application for an extension of time to file the petition." *See* Letter of Clerk of Supreme Court, dated June 7, 1999, Docket No. 98-5-0078. She moved to file a petition out of time anyway – a petition that raised, for the first time, a constitutional challenge to the Minnesota statute. Indeed, the untimely petition contained, verbatim, the argument presented in the third issue here. The Court denied the motion and refused to file the untimely petition. *Carlson v. Hyundai Motor Co.*, 527 U.S. 1033, 119 S.Ct. 2389 (June 24, 1999) ("Motion to direct the Clerk to file petition writ of certiorari out-of-time denied.").

On May 17, 1999 – two months after Eighth Circuit's mandate issued and was filed by the district court – the Minnesota Legislature overrode the governor's veto of a bill amending Minn. Stat. § 169.685 to allow evidence about seat belts in cases claiming seat belt defect. The statutory change, by its terms, applied only to actions "pending on or commenced on or after the effective date" of May 18, 1999. (Pet. App. Ex. A)

On May 30, 1999, petitioner sought to revive her finally-decided case by moving the Eighth Circuit to recall the mandate based on the new law. The Court denied the request on August 9, 1999. (Pet. App. A-25, A-40)

On June 9, 1999, after the time for certiorari had run, petitioner moved the district court under Rule 60(b) to vacate the affirmed and now-final judgment, so she could benefit from the new law. The district court denied the motion holding that the new statute on its face did not permit the relief sought: the new law applied only to "pending" cases, and petitioner's case was finally decided, not "pending." (Pet. App. A-40) Petitioner appealed the denial to the Rule 60(b) motion to the Eighth Circuit, which affirmed the district court in a an unpublished decision. (Pet. App. A-42) She sought rehearing and rehearing *en banc*, which were denied on September 19, 2000. (Pet. App. A-45)

REASONS TO DENY THE WRIT

None of the issues presented is proper for review. The first two – addressing the Eighth Circuit's unpublished affirmance of a Rule 60(b) denial – attack a fact-based exercise of discretion, quarrel with state law, and proposes an absurd reading of Rule 60(b). The final issue proposes constitutional questions never raised in the Eighth Circuit, untimely in any event, and ultimately absurd. We address the two sets of issues in turn.

I. The First Two Issues: There Is No Reason To Review The Eighth Circuit's Unpublished, Fact-Based Decision That Conflicts With Nothing.

Petitioner posits that a district court must exercise discretion under Rule 60(b) even if the statute urged as the basis for the Rule 60(b) motion allows no relief. That is an argument directed at a unique situation, and has no support anyway.

As petitioner acknowledges, Rule 60(b) is reserved for "extraordinary circumstances." By definition "extraordinary circumstances" are just that – extraordinary – and necessarily fact-based. This case proves the point, for the facts here are pretty unique and rarely occur. Petitioner cites no case quite like this: where a matter was dismissed in a decision that became final upon affirmance and issuance of the mandate, based on a concededly correct application of a state statute, which then changed after the decision, in an amendment that by its terms applied only to "pending" cases, and then petitioner sought to reopen the "non-pending" (Pet. 9) case based on the new statute that applied only to pending cases.

None of petitioner's cases involves a post-affirmance, post-mandate Rule 60(b) motion based on a statute that expressly applies only to "pending" cases. Indeed, one case denies Rule 60(b) relief when decisional law changes, even if the change is retroactive (much less when it is prospective).[2] Others involve new law applied to still-pending cases.[3] Still others involve statutory changes retroactive by their terms.[4] Another applies new

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[2] *See Booker v. Singletary*, 90 F.3d 440, 442 (11th Cir. 1996).

[3] *See McGrath v. Potash*, 199 F.2d 166 (D.C. Cir. 1952) (injunction vacated); *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 697 (10th Cir. 1989) (new law applied to case stayed pending arbitration); *Michigan Surety Co. v. Service Mach. Corp.*, 277 F.2d 531, 532 (5th Cir. 1960) (Rule 60(b) relief sought before appeal of judgment; new law applied on appeal); *Smith v. Holtz*, 879 F.Supp. 435, 438 (M.D.Penn. 1995) (Rule 60(b) relief sought while appeal pending); *Max M. v. Thompson*, 585 F.Supp. 317, 321 (N.D.Ill. 1984), *as amended*, 592 F.Supp. 145 (1984) (Rule 60(b) reconsideration of dismissed claims based on new law while other claims still pending); *Cincinnati Ins. Co. v. Byers*, 151 F.3d 574, 578 (6th Cir. 1998) (Rule 60(b) request made while action still in district court; new law applied on appeal of both judgment and Rule 60(b) denial); *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 929 (5th Cir. 1976) (Rule 60(b) motion made in district court while "appeal was still pending"). *See also Allen v. Shalala*, 835 F.Supp. 462, 464 (N.D.Ill. 1993) (Rule 60(b) proper remedy for "predicament" where fees denied without prejudice but because order non-final party "may neither appeal nor refile his fee petition" when new interpretation of "prevailing party" decided).

[4] *See In re Pacific Far East Lines, Inc.*, 889 F.2d 242, 244 (9th Cir. 1988); *Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986); *Yaris v. Special School District of St. Louis County*, 661 F.Supp. 996, 998 (E.D.Mo. 1987). *See also Cornell v. Nix*, 119 F.3d 1329, 1332-33 (8th Cir. 1997) (retroactive constitutional decision permits reconsideration of habeas corpus denial, especially where in

law to ongoing conduct.[5] Another grants Rule 60(b) relief not because of legal change *per se* but because denying relief would mean opposite results in actions arising out of same incident, depending on whether the case remained in state or was removed to federal court.[6] Still another has nothing to do with a change in the law, but grants Rule 60(b) relief to resolve an inconsistency in court rulings.[7] If the cases show anything, they show that each Rule 60(b) case is unique, calling for fact-based exercise of discretion; review here would do little to guide courts in the exercise of that discretion in the future.

As to the exercise of discretion here, the courts did exactly what the state law at issue commanded. Minnesota Statute § 169.685's amendment expressly is prospective: it "applies to actions pending on or commenced on or after the effective date." (Pet. 4) The Court of Appeals applied the statute prospectively according to its terms, and declined to apply the statute to a case already finally decided and so not "pending." That is not radical, but just what the law requires: federal courts in diversity are required to apply state law as it is written. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938). This Court does not sit to resolve issues of state law. *Pierson v. Ray*, 386 U.S. 547, 558, 87 S.Ct. 1213, 1219 fn. 12 (1967) ("we do not

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habeas corpus "conventional notions of finality have no place") (quoting *Sanders v. United States*, 373 U.S. 1, 8 (1963)).

[5] *See Manhattan Cable Television v. Cable Doctor, Inc.*, 824 F.Supp. 34, 36 (S.D.N.Y. 1993).

[6] *Pierce v. Cook & Co.*, 518 F.2d 720, 722-23 (10th Cir. 1975).

[7] *Knox v. Lichtenstein*, 654 F.2d 19, 21 (8th Cir. 1981).

ordinarily review the holding of the court of appeals on a matter of state law").

Petitioner urges that her action was not "final" because although the mandate had issued, the time to file a certiorari petition had not yet run. But the meaning of "pending" under a Minnesota statute is a state law question. Moreover, even under federal law, a matter is "final" upon issuance of the mandate, which only can be stayed under F.R.A.P. 41(d) upon the showing of a "certworthy" issue. *See also Curry v. Baker*, 479 U.S. 1301, 1302, 107 S.Ct. 5, 6 (1986) (Supreme Court will stay mandate only if there is: (1) a reasonable probability that four justices will grant certiorari; (2) a significant possibility of reversal; and (3) a likelihood of irreparable harm if stay is not granted). Here, there was no certworthy issue; the original Eighth Circuit decision involved state-law interpretation, and petitioner did not raise the constitutional arguments she belatedly tried to put to this Court. In essence, petitioner proposes a right to file a frivolous petition, and to circumvent F.R.A.P. 41(d)'s requirements of a certworthy issue and a stay to avoid issuance of a mandate and finality. No case recognizes such a right.

In the end, the petition boils down to an argument that Rule 60(b) permits (or, as petitioner seems to suggest, requires) a district court to void an affirmed and final decision to allow application of a state statute that on its face does not apply. That is, if we may say so, an astonishing proposition. By definition, every party subjected to a Rule 12(b)(6) dismissal cannot "prosecute her claim on the merits" (Pet. 13), because the substantive law allows no relief. There is no discretion to grant relief where the law affords none. *See Koon v. United States*, 518 U.S. 81,

100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.") (citation omitted). Rule 60(b) is an extraordinary remedy for exceptional cases, not a free pass from controlling law whenever it provides no relief. Petitioner cites no case holding otherwise.[8]

There is nothing to review.

II. The Final Issue: Never Raised, Untimely And Absurd.

The final issue challenges the constitutionality of the original Minnesota statute, before its amendment. But that statute was not the basis for the Rule 60(b) motion sought to be reviewed; the amended statute was. Petitioner made no constitutional challenge to the original statute in the proceedings at issue here, and the Eighth Circuit had no occasion to address one. That alone makes review improper.

But there's more. In the case that did address the original statute, *Carlson v. Hyundai Motor Co.*, 164 F.3d 1160 (8th Cir. 1999), petitioner made no constitutional challenge to the statute either. Only after the time for certiorari ran did she imagine constitutional issues, and then sought to file an untimely petition that raised – essentially verbatim – the constitutional argument tendered here. This Court ruled: "Motion to direct the Clerk

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[8] Petitioner may think it harsh that she helped occasion the change in law but does not benefit from it. If so, her quarrel is with the legislature that made the law prospective only.

to file petition writ of certiorari out-of-time denied." *Carlson v. Hyundai Motor Co.*, 119 S.Ct. 2389 (June 24, 1999).

Thus, the supposed constitutional issue was never raised and untimely a year ago. It is doubly unraised and untimely now. She cannot revive it by the artifice of a Rule 60(b) motion (much less when the issue was not even raised in the Rule 60(b) proceedings). *Browder v. Dept. of Corrections, Illinois*, 434 U.S. 257, 263, 98 S.Ct. 556, 560 fn. 7 (1978), *reh'g denied*, 434 U.S. 1089, 98 S.Ct. 1286 (1978) (appeal from denial of Rule 60(b) motion does not open underlying judgment to review).

As to the merits of the unraised and untimely argument, there is nothing to review. Petitioner attacks the Minnesota law as a deprivation of equal protection and due process because it "eliminated her right to present the evidence/facts bearing upon her cause of action against the respondent." (Pet. 20) But Minnesota said she had no relevant "evidence" or "cause of action." Petitioner admits that a "state legislature has the power to prescribe new and alter existing rules of evidence, or to prescribe methods of proof . . . ". (Pet. 20) Yet, she essentially argues that states cannot make evidentiary rules or draw lines between claims that should and should not be permitted. She cites no support for that.[9]

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[9] Petitioner cites only constitutional boilerplate that has no bearing on, much less creates a conflict concerning, this issue. *See Pembina Cons. Silver Min. & Milling Co. v. Commonwealth of Pennsylvania*, 125 U.S. 181, 188-89, 8 S.Ct. 737, 740-741 (1888) (equal protection applies to corporations); *Galvan v. Press*, 347 U.S. 522, 530, 74 S.Ct. 737, 742 (1954), *reh'g denied*, 348 U.S. 852 (1954) (due process applies to aliens); *Matthews v. Eldridge*, 424

CONCLUSION

The Petition for Certiorari should be denied.

DATED: January 8, 2001

Respectfully submitted,

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U.S. 319, 339-40 (1976) (due process does not require hearing before termination of disability benefits); *Thompson v. City of Louisville*, 362 U.S. 199, 206, 80 S.Ct. 624, 629 (1960) (criminal charges unsupported by evidence violate due process); *accord Garner v. State of Louisiana*, 368 U.S. 157, 173-74, 82 S.Ct. 248, 257 (1961).